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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-258

BUCYRUS-ERIE COMPANY,
Petitioner,

v.

THE DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF THE STATE OF WISCONSIN, ET AL.,
Respondents.

BRIEF OF WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act (ERISA) preempt application of the Wisconsin Fair Employment Act to employee benefit plans which are regulated by ERISA and which are alleged to be sex discriminatory because they do not provide the same benefits for pregnancy disability as are provided other temporary disabilities?

ARGUMENT

I. The Petition For A Writ Of Certiorari Should Be Denied Because The Decision Of The Seventh Circuit Is Consistent With The Majority Of Courts Which Have Considered The Issue Of ERISA Preemption Of State Fair Employment Laws.

Petitioner Bucyrus-Erie Company asserts two reasons why its petition for a writ of certiorari should be granted. First, the Company contends that the decision of the Seventh Circuit Court of Appeals conflicts with decisions of two other circuit courts of appeal. Second, the Company contends that the decision of the Seventh Circuit subjects the Company's employee benefit plan to inconsistent state regulation which would frustrate the purpose of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* Such reasons do not withstand careful analysis and do not provide an adequate basis for a writ of certiorari.

The precise question decided by the Seventh Circuit and the question presented to this Court is whether ERISA preempts application of the Wisconsin Fair Employment Act, secs. 111.31-111.37, Wis. Stats., to employee benefit plans which are regulated by ERISA and which are alleged to be sex discriminatory because they do not provide the same benefits for pregnancy disability as are provided for other temporary disabilities. The Seventh Circuit decided "that Congress did not intend [ERISA] to preempt the enforcement of state fair employment laws." *Bucyrus-Erie Co. v. Dept. of Industry, Labor, and Human Relations*, 599 F. 2d 205, 207 (7th Cir. 1979).

The decision of the Seventh Circuit is consistent with the majority of courts which have considered the issue of ERISA preemption of state fair employment laws and have concluded that such state laws are *not* preempted. *Liberty Mut. Ins. Co. v. State Div. of Human Rights*, 61 A.D. 2d 822 (N.Y. Sup. Ct., App. Div., Feb. 21, 1978); *St. Vincent's Medical Center of Richmond v. State Human Rights Appeal Board*, 59 A.D. 2d 778 (N.Y. Sup. Ct., App. Div., Oct. 31, 1977), *cert. denied*, No. 78-592, 47 U.S.L.W. 3394, 3455 (Jan. 8, 1979); *Westinghouse Electric Corp. v. State Human Rights Appeal Board*, 60 A.D. 2d 943 (N.Y. Sup. Ct., App. Div., Jan. 19, 1978), *cert. denied*, No. 78-758, 47 U.S.L.W. 3441, 3455 (Jan. 8, 1979); *Goodyear Tire & Rubber Company v. Department of Industry, Labor and Human Relations*, 87 Wis. 2d 56, 273 N.W. 2d 786 (Wis. Ct. Apps., 1978); *Time Insurance Co. v. Department of Industry, Labor and Human Relations*, Case No. 154-423, 16 FEP Cases 391 (Dane Co. Cir. Ct., Jan. 3, 1978); *Gast v. State of Oregon*, No. CA 9686, 18 FEP Cases 210 (Ore. Ct. Apps., Oct. 2, 1978); *Illinois Bell Tel. Co. v. Fair Employment Practices Commission*, 386 N.E. 2d 599 (Ill. Ct. Apps., 1979); *Minnesota Mining and Manufacturing Company v. Department of Human Rights*, Nos. 49079, 49137 (Minn. Sup. Ct., Aug. 10, 1979); *Brown Company v. Department of Industry, Labor and Human Relations*, No. 77-C-29 (W.D. Wis., Aug. 28, 1979); *Lukus v. Westinghouse Electric Corporation*, No. GD 77-14803 (Penn. Ct. Comm. Pleas., Allegheny Co., April 20, 1978); *contra*, *Pervel Industries Inc. v. Connecticut Commission of Human Rights*, 468 F. Supp. 490 (D. Conn., 1978), *aff'd*, No. 78-7604 (2d Cir., April 23, 1979), *pet. for cert. filed*, No. 79-107, 48 U.S.L.W. 3025 (July 23, 1979); *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor and Industry*, No. 41908 (Mont. 1st. Jud. Dist., Lewis and Clark Co., August 14, 1978).

The Company contends that the decision of the Seventh Circuit conflicts with the decision of the Ninth Circuit in *Hewlett-Packard Co. v. Barnes*, 571 F. 2d 502 (9th Cir., 1978) and with the decision of the Second Circuit in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*. The Department disagrees.

Hewlett-Packard Co. v. Barnes clearly is distinguishable. It did not involve the question of whether ERISA preempted enforcement of a state fair employment law. Rather, it involved the question of whether ERISA preempted a state health care statute which regulated such areas as funding, disclosure and sales practices. The Ninth Circuit had no difficulty deciding that ERISA preempted the state statute since the principal purpose of ERISA is to curb funding and disclosure abuses in employee benefit plans by creating minimum federal safeguards. *See Wadsworth v. Whaland*, 562 F. 2d 70, 73-74 (1st Cir., 1977); 29 U.S.C. § 1001. State fair employment laws, however, are different. Thus, District Judge Renfrew who found ERISA preemption in the lower court decision in *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal., 1977), found no ERISA preemption of a state community property law which required employee benefit plans subject to ERISA to pay part of a participant's benefits to a divorced spouse, *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal., 1978), citing as authority *Time Insurance Company v. Department of Industry, Labor and Human Relations*, 16 FEP Cases 391 [holding that ERISA did not preempt application of the Wisconsin Fair Employment Act].

The Second Circuit decision in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, concluding that ERISA once preempted the Connecticut fair employment statute, is confusing. Its "brief affirmance ... infers that state fair employment laws

were preempted by ERISA but were somehow reinstated by the passage of the federal pregnancy disability act." *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations*, 599 F. 2d at 212-213, n. 13. Thus, in prospective terms, the decision of the Seventh Circuit in *Bucyrus-Erie* and the decision of the Second Circuit in *Pervel* are not in conflict since both conclude that ERISA does *not* preempt state fair employment laws, at least not since the amendment of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, by the Pregnancy Disability Act. Pub. L. No. 95-555, 92 Stat. 2076.

To the extent that the Second Circuit decision in *Pervel* conflicts in retroactive terms with the Seventh Circuit decision in *Bucyrus-Erie*, the *Pervel* decision is at odds with the overwhelming majority of courts which have found *no* ERISA preemption of state fair employment laws. The Second Circuit decision in *Pervel* adopts the reasoning of the district court which rejected the argument that ERISA preemption of state fair employment laws would alter or modify federal antidiscrimination law (Title VII), contrary to ERISA. 468 F. Supp. at 493. Although the *Pervel* decisions reject the simple syllogism that Title VII preserves state fair employment laws, ERISA preserves Title VII, and therefore, ERISA preserves state law, they fail to address the very pragmatic problems (increased federal spending and/or an increased federal case backlog) which ERISA preemption would engender in the federal anti-discrimination enforcement scheme which specifically incorporates state fair employment laws. *Cf. Bucyrus-Erie Co.*, 599 F. 2d at 210-212. Thus, any *retroactive* conflict between the *Pervel* and *Bucyrus-Erie* decisions does not provide an adequate basis for granting certiorari.

II. The Petition For A Writ Of Certiorari Should Be Denied Since The Decision Of The Seventh Circuit Does Not Subject The Company's Employee Benefit Plan To Inconsistent State Regulation.

The Company's second reason why its petition for a writ of certiorari should be granted is based on its contention that the Seventh Circuit's decision in *Bucyrus-Erie* would subject the Company's employee benefit plan to inconsistent state regulation, contrary to the purposes of ERISA. This contention is wholly without merit.

First, as the district court noted in *Pervel*, 468 F. Supp. at 493, "ERISA does not mandate uniformity of plan benefits, and therefore preemption of state anti-discrimination laws is not required to maintain any scheme for federally-required uniformity of benefits." Second, the decision of the Seventh Circuit in *Bucyrus-Erie* merely freed the Department to apply the sex discrimination prohibition of the Wisconsin Fair Employment Act to the Company's employee benefit plan. The Wisconsin Fair Employment Act has been interpreted to mean that it is sex discriminatory to treat pregnancy disability differently than other temporary disabilities. *Ray-O-Vac v. ILHR Department*, 70 Wis. 2d 919, 236 N.W. 2d 209 (1975); *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W. 2d 757 (1979). Since Bucyrus-Erie Company is a multi-state employer subject to Title VII, and since Title VII was amended by the Pregnancy Disability Act to require subject employers in *all* states to treat pregnancy disability the same as other temporary disabilities, application of the Wisconsin Fair Employment Act to the Company's employee benefit plan [as permitted by the Seventh Circuit's decision in *Bucyrus-Erie*] will *not* subject the Company plan to inconsistent state regulation. In practical effect, the pregnancy disability amendments to Title VII have mooted prospectively the entire controversy over employer treatment of pregnancy disability for employers like the Company who are subject to Title VII.

III. The Petition For A Writ Of Certiorari Should Be Denied Because ERISA Preemption Of State Fair Employment Laws (1) Would Alter And Impair The Federal Framework For Prohibiting Employment Discrimination, And (2) Would Cause A Regulatory Void As To Employers Subject To ERISA But Not Subject To Federal Anti-Discrimination Law.

Apart from the reasons set forth in the preceeding sections of its argument, the Department submits that the petition for a writ of certiorari should be denied because ERISA preemption of state fair employment laws (1) would alter and impair the federal framework for prohibiting employment discrimination, and (2) would cause a regulatory void as to employers subject to ERISA but not subject to federal anti-discrimination law. As the Seventh Circuit concluded in *Bucyrus-Erie Co.*, 599 F. 2d at 210-211:

> [W]e believe that there is evidence outside section 514 of ERISA revealing a congressional intent to preserve the application of state fair employment laws in general, and pregnancy disability laws in particular. We find, however, that this intention to except

state fair employment laws from preemption need not be implied. Instead, we rely on this evidence of intent to conclude that the preemption of state fair employment laws would operate to "alter, amend, modify, invalidate, impair or supersede" another federal "law, rule or regulation" in contravention of an express exception in section 514 of ERISA. 29 U.S.C. § 1144 (d).

. . . .

Preemption of state fair employment laws would at a minimum "alter," and probably "impair," the Congressional scheme for preventing and penalizing employment discrimination in the administration of welfare benefit plans in contravention of section 514 (d). This conclusion derives support from a variety of sources: the provisions and legislative history of Title VII, the legislative history of ERISA, and the legislative history of the recently enacted federal pregnancy disability amendments to Title VII. ... [I]t is clear that the federal scheme embodied in its laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework. State laws are specifically preserved in two sections of Title VII and Title XI, section 708, 42 U.S.C. § 2000e-7, and section 1104, 42 U.S.C. § 2000h-4.

Congress also designed an enforcement system premised on the enforcement and preservation of state fair employment laws. Federal agency action is deferred until a state has had an initial opportunity to remedy the employment discrimination charged. See 42

U.S.C. §§ 20003-5 (c), (d), (e). Further, under § 2000e-5 (b) the EEOC must "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law" in determining whether there is reasonable cause to believe a discrimination charge. To preempt the application of state fair employment laws to employee benefit plans would also cause a regulatory void as to employers not subject to Title VII but operating plans covered by ERISA.

The importance of this federal-state relationship was underscored by Senator Clark in the Senate debates on Title VII:

> It is important to note that title VII is so drafted that the States and the Federal Government can work together. When the Bill is enacted, the State ... agencies will continue in force, except where they are inconsistent with title VII. The Federal Commission can agree under title VII not to bring any suits in cases in a particular State ... where the State ... has adequate power under its own laws ... to carry out the purposes of the act and it is effectively exercising that power.
>
> In addition, the Federal Commission can make arrangements to use and pay for the services of State ... agencies in carrying out its duties under the Federal law if the State agencies are willing.
>
> So, I take it that title VII meshes nicely, logically, and coherently with the State ... legislation already in existence in a number of the States ... The Federal Government and the State governments could cooperate effectively

> and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted.

110 CONG. REC. 7205 (1964).

ERISA preemption of state fair employment laws would alter and impair the enforcement machinery of Title VII. EEOC no longer could defer to states complaints alleging that employee benefit plans discriminate on the basis of race, sex, religion, etc. This covers a large area since an "employee benefit plan" is defined in ERISA to include plans providing pension, health care, accident, disability, death, unemployment and vacation benefits, and also providing apprenticeship or other training programs, day care, scholarship funds and prepaid legal services. 29 U.S.C. §§ 1002 (2) and (3). The result would be increased federal spending or an increased federal backlog. EEOC would have to process all such complaints on its own where previously the states processed complaints within their concurrent jurisdiction. Also, federal courts would have to hear and decide cases now handled by state administrative agencies and state courts.

ERISA preemption of state fair employment laws also would create a regulatory vacuum. An employer subject to ERISA, 29 U.S.C. § 1003, but not subject to Title VII (having fifteen or fewer employees), 42 U.S.C. § 2000e (b), would be free to discriminate regarding employee benefit plans on the basis of race, sex, religion, etc. Thus, such an employer could preclude a black employee, solely on the basis of race, from pension, health care, accident, disability, death, unemployment and vacation benefits, and from apprenticeship and other training programs, day care, scholarship funds and prepaid legal services. 29 U.S.C.

§§ 1002 (2) and (3). Consequently, while persons employed by larger employers would be protected by Title VII against such discrimination, persons employed by smaller employers would be without recourse.

Such regulatory void compelled the court in *Gast v. State of Oregon,* 18 FEP Cases at 214-215, 217, to conclude that ERISA did not preempt Oregon's fair employment statute. The court commented:

> The question remains whether the broad language of 29 U.S.C. § 1144 (a) preempts the type of state regulation at issue here.
>
> . . . .
>
> (I)f we are to adopt the construction of 29 U.S.C. § 1144 (a) advanced by plaintiffs, we must import to Congress not only an intent to preempt state law, but also an intent to cease all governmental regulation, state or federal, other than the disclosure and fiduciary requirements. ... There is nothing in the legislative history suggesting such an intent.
> . . . .
>
> We decline to make such a broad interpretation in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern.

CONCLUSION

The decision of the Seventh Circuit in *Bucyrus-Erie* is consistent with the majority of courts which

have considered the issue of ERISA preemption of state fair employment laws. The Second Circuit decision in *Pervel,* the only other federal appellate court decision on the issue of ERISA preemption of state fair employment laws, is not in conflict with *Bucyrus-Erie.* Both *Pervel* and *Bucyrus-Erie* conclude that ERISA does *not* presently preempt state fair employment laws.

The decision of the Seventh Circuit in *Bucyrus-Erie* does not subject the Company to inconsistent state regulation. Since Amendment of Title VII by the Pregnancy Disability Act, the Company has been required to treat pregnancy disability the same as other temporary disabilities in *all* states in which it operates — not solely in Wisconsin.

ERISA preemption of state fair employment laws would alter and impair the federal framework for prohibiting employment discrimination. Further, ERISA preemption would cause a regulatory void as to employers subject to ERISA but not subject to Title VII.

It is respectfully submitted that the petition of Bucyrus-Erie Company for a writ of certiorari should be denied.

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